BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE A. GARCIA Claimant VS. **MAHANEY ROOFING COMPANY, INC.** Respondent AND **VALLEY FORGE INSURANCE CO.** Insurance Carrier	)	Docket No. 1,068,853

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 9, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Robert R. Lee of Wichita, Kansas, appeared for claimant. James R. Hess of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant was injured arising out of and in the course of his employment with respondent on January 21, 2014. The ALJ ordered respondent to furnish the names of two physicians for selection of one by claimant, and ordered all medical paid as authorized. Temporary total disability benefits were granted, and the ALJ determined claimant was not terminated for cause.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 1, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ exceeded his jurisdiction and erred in concluding claimant met his burden of proving an injury arising out of and in the course of his employment on or about January 21, 2014. Respondent maintains claimant is not a credible witness, and the preponderance of the evidence contradicts claimant's testimony.

Claimant argues the ALJ was "in the best position to weigh the credibility of the witnesses and review the evidence," and thus, the ALJ's Order should be affirmed in all respects.[1]

The sole issue for the Board's review is: Did claimant sustain an injury arising out of and in the course of his employment with respondent on January 21, 2014?

FINDINGS OF FACT

Claimant was employed by respondent as a roofer. On January 21, 2014, claimant stated he was tearing pieces of insulation off of a flat commercial roof when his back "snapped."[2] Claimant stated he informed his supervisor, Jose Villerrale, and was directed to "throw trash" instead.[3] Claimant explained this involved dumping wheelbarrows full of discarded roofing materials off of the side of the roof into a dumpster below. Claimant performed this activity for the remainder of the day, and he stated his back was bothering him the entire time.

The following morning, claimant testified he could not get out of bed due to his back pain. Claimant called an ambulance and was taken to Via Christi Hospital (Via Christi) in Wichita, Kansas. Claimant stated he called and notified respondent he would not be at work that day upon his arrival to the hospital. Claimant testified:

> Q. Who did you talk to?
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> A. I forget her name. She's the secretary there.
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> . . . .
>
> Q. And what did you tell her?
>
> A. I told her my back was injured, because yesterday I was tearing off the roof, the day before.[4]

Vonda Norris, respondent's office manager, testified she received a phone call from Via Christi on January 22, 2014. Ms. Norris stated she was informed claimant had a back problem and would be in the hospital longer than was anticipated. Ms. Norris testified she asked specifically if claimant had reported a workers compensation injury and was told

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[1] Claimant's Brief (filed July 7, 2014) at 4.

[2] P.H. Trans. at 6.

[3] *Id*.

[4] *Id.* at 9.

claimant had "turned it in under his health insurance."[5] Ms. Norris documented the phone call in writing the following day:

> On 1/22/14 I received a call from Sonya @ Via Christi Hospital. She said she was ask [*sic*] by [claimant], which had been admitted to the hospital, to call [respondent] and let us know he was in the hospital and not able to work. She said that a week ago, he had been in a 4-wheeler accident and required stitches in his knee, but on the morning of 1/22, he woke up and could barely move due to back pain related to the accident. She said he had given her his [insurance] information and there was no mention of this being a Work Comp injury.[6]

Via Christi records indicate claimant was admitted for intractable back pain on January 22, 2014. Scans of claimant's lumbar spine, including a CT scan and an MRI, revealed no acute disc problems or spinal cord injury. Claimant received physical therapy, occupational therapy, pain medication, and muscle relaxants. He was also given a brace for his back and prescribed a front-wheeled walker to be used as necessary. Claimant was discharged on January 26, 2014, as he was able to ambulate. Claimant was advised to follow up with outpatient physical therapy and to see a primary care physician in one week and again before returning to work. Via Christi advised a work release from January 22, 2014, until February 2, 2014.

Claimant provided a history upon admission, as noted in Via Christi records:

> Per the patient, 1 week ago he was involved in a crash when his 2-wheeler lost balance; and he rolled over. He said during that injury, he was hurt all over his body but more so his left knee was bothering him. For the past couple of days, he started noticing some mild to moderate low back pain. He tried taking some Tylenol along with using some heat patches. He said nothing seemed to help. This morning when he woke up, the pain was very severe to the point where he was having to crawl into the bathroom and was not able to ambulate.[7]

Additional hospital records indicate claimant "possibly" sustained a recent injury at work, as he complained of back pain for three weeks "after lifting some boxes at work" and chronic left knee pain.[8] An Occupational Therapy Evaluation dated January 22, 2014,

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[5] *Id.* at 56.

[6] *Id.*, Resp. Ex. 2.

[7] Stipulation of Parties to Admissibility of Medical Records from Via Christi Hospitals Wichita, Inc. (filed June 4, 2014), Ex. A at 6.

[8] *Id.* at 9.

indicates claimant was admitted to the hospital with intractable back pain, "moped accident and rolled the moped 1 wk ago. . . . lifting boxes 3 days ago and experienced back pain."[9]

Claimant testified regarding the moped incident:

> Q. You reported to Doctor Murati that you had no prior accidents to your back at least dating back two or three years to a motor vehicle accident; is that correct?
>
> A. Yes, I did.
>
> Q. Had you been hurt recently for any unwork-related incidents?
>
> A. No.
>
> Q. Were you involved in a Moped accident or crash the week before January 21st?
>
> A. Yes, I was.
>
> Q. Were you injured?
>
> A. No. I just scraped my knee. I didn't even go to the hospital that day.
>
> Q. You didn't seek medical treatment?
>
> A. No.[10]

Documentation from the clinic at West Wichita Family Physicians, P.A., noted claimant was seen there on January 17, 2014.[11] Claimant testified he presented at the clinic on that day to obtain ointment and pain medication for his left knee. Claimant stated he informed respondent he scraped his knee as a result of a moped accident. Mr. Villerrale, claimant's supervisor, testified claimant informed him of the moped accident prior to January 21, 2014. Mr. Villerrale stated claimant told him he was injured as a result of the moped accident, and claimant missed work because of his injuries.

Mark Bolt, respondent's president and majority owner, testified company policy requires an employee to report a work-related injury as soon as possible, preferably within 24 hours of the incident. He explained there is no limit to the severity of the injury before it is reported. Previously, in August 2013, claimant stepped through a roof while at work. Although claimant sustained no injury as a result of the August 2013 accident, an accident

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[9] *Id.* at 14.

[10] P.H. Trans. at 20-21.

[11] See *id*., Resp. Ex. 5.

report was still completed once he reported to his supervisor. Mr. Bolt testified no accident report was completed for anything involving January 21, 2014. Further, Mr. Bolt stated he was aware of claimant's moped accident, but had no conversations with claimant regarding a work-related injury on January 21, 2014. Mr. Bolt agreed it is the responsibility of claimant's supervisor to report any accident, and he testified Mr. Villerrale was an exceptional employee. Respondent has no incentive program for accident-free working days, and supervisors are disciplined if an accident report is not completed following a reported incident.

Mr. Villerrale testified claimant never reported a work accident to him on January 21, 2014. Mr. Villerrale noted he told claimant to not to lift anything heavy that day, but he was concerned about claimant's knee condition after the moped accident. Following his notification that claimant was filing a claim involving January 21, 2014, Mr. Villerrale asked the rest of the crew if anyone was aware of claimant's injury. Mr. Villerrale testified, "Nobody say nothing about it on the job site. . . . Nobody report nothing about it."[12] Ms. Norris and Mr. Bolt also testified claimant never reported a work injury involving January 21, 2014.

Respondent utilizes a Daily Time Card and Safety Record for its employees.[13] An employee's initials on this document indicate the employee's understanding: 1) safety is the employee's responsibility to perform and report to company authorities; 2) the day's activities were completed safely and without injury; and 3) the recorded hours worked were accurate. The safety record for January 21, 2014, contains claimant's initials. Claimant testified the initials on the document did not look like his, and he did not recall initialing the sheet. When asked if claimant knew of anyone that would have initialed the document in his place, claimant replied, "Oh, they do it all the time there."[14] Mr. Villerrale disputed claimant's testimony, stating he only signs for himself and does not falsify anyone's initials on the time card. Moreover, Mr. Villerrale testified he provides the sheet to his crew for signature at the end of each work day, and he specifically remembered claimant initialing the time card on January 21, 2014.

Douglas Hoover, respondent's superintendent, handles disciplinary issues as a part of his job duties. Mr. Hoover stated he was on claimant's job on January 21, 2014, and at no point did claimant report a work-related injury to him. Prior to January 21, 2014, Mr. Hoover met with claimant regarding claimant's absenteeism and tardiness. Claimant had received previous written Employee Warning Notices for absenteeism and tardiness throughout his employment with respondent. Mr. Hoover testified he met with claimant on

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[12] P.H. Trans. at 38.

[13] See *id*., Resp. Ex. 1.

[14] P.H. Trans. at 19.

February 7, 2014, at which time claimant's employment with respondent was terminated. Mr. Hoover stated:

> He had – he had missed a number of days, or had enough absentees or tardiness that met the criteria for terminating him, so I called him into the superintendent's office, we had the paper there in front of him, and I went over it with him, told him why and asked him to sign it, and he refused to sign it and I noted that he refused to sign, and I signed it and dated it.[15]

According to respondent's records, claimant had three unexcused absences for the month of January 2014, which did not include his excused hospital and doctor visits. Claimant testified regarding his termination:

> Q. You were terminated because he told you that under the company policy you had violated the company policy regarding absenteeism; is that fair?
>
> A. Yes.
>
> Q. Okay. And didn't have anything to do with any work accident or reportable work accident?
>
> A. It had to do with the days that I missed when I was in the hospital, because he said it was excused or unexcused.[16]

Claimant is currently on probation in the State of Kansas and must maintain employment as one of his conditions. Claimant testified he was previously convicted of aggravated robbery, assault on a law enforcement officer, evading arrest, and engaging in criminal enterprise. Claimant stated he has not worked since January 2014, as he cannot perform heavy lifting.

Claimant testified he received no medical treatment since leaving the hospital, though he did see Dr. Pedro Murati for independent medical evaluation (IME) purposes. Dr. Murati, a board certified independent medical examiner, performed an IME of claimant on March 31, 2014, per claimant's counsel's request. Claimant reported symptoms of low back pain, tingling in the right leg "first thing in the morning," and complaints of being very limited with daily activities.[17] Dr. Murati took a history of claimant, including a description of the January 21, 2014, work event and mention of a motor vehicle accident 2-3 years previously which resulted in low back pain that eventually resolved. There is no mention of claimant's moped accident.

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[15] *Id*. at 47-48.

[16] *Id*. at 15-16.

[17] *Id*., Cl. Ex. 1 at 1.

Dr. Murati indicated the only medical records available for his review were print-out prescriptions from Via Christi Clinic. Dr. Murati performed a physical examination of claimant and determined claimant sustained low back pain with signs of radiculopathy and bilateral SI dysfunction. Dr. Murati placed temporary restrictions on claimant and recommended he receive physical therapy, anti-inflammatory medication, pain medication, and steroid injections. Dr. Murati wrote:

> Apparently, on this claimant's date of injury he sustained enough permanent structural change in the anatomy of his low back which caused pain necessitating treatment. There may be significant preexisting low back injury, however there is no documentation provided to such effect. Therefore, barring any significant preexisting injury, it is under all medical reasonable certainty that the prevailing factor in the development of his low back condition is the accident at work on 01-21-14 while employed at [respondent].[18]

Claimant testified he continues to have pain in his lower back and cannot "do too much bending."[19] He stated he sleeps on a flat board on his mattress. Claimant indicated he experiences pain in his entire low back around the belt line, more on the left. Claimant denied having pain shooting into either leg.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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[18] *Id.* at 3.

[19] P.H. Trans. at 11.

K.S.A. 2013 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> . . . .
>
> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.
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> . . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[20] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[21]

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[20] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[21] K.S.A. 2013 Supp. 44-555c(j).

ANALYSIS

The ALJ found claimant suffered an injury arising out of and in the course of his employment with respondent on January 21, 2014. The undersigned Board Member disagrees. In *Kindel v. Ferco Rental, Inc.*,[22] the Kansas Supreme Court provided an analysis for determining if an injury arises out of and in the course of employment. In *Kindel*, the Court wrote:

> Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[23]

The only evidence claimant was injured as he described on the date he alleges is his own testimony. His statement that he notified his supervisor of an injury is disputed by the supervisor. Claimant initialed a form verifying the hours he worked on January 21, 2014, and acknowledging he was not injured on that date.

Claimant sought treatment with West Wichita Family Physicians on January 17, 2014, for injuries resulting from a moped accident. In the history taken at Via Christi, claimant gave a history of rolling over on his two-wheeler. The notes indicate claimant started noticing mild to moderate low back pain for the last couple of days. On the hand-written intake notes taken January 22, 2014, a history was recorded stating patient complained of pain for three weeks after lifting boxes at work. The occupational therapy notes taken January 23, 2014, note a history of a moped accident one week prior and pain from lifting boxes three days ago. Nothing in the Via Christi records suggests claimant suffered an injury on January 21, 2014, as he alleges.

The Via Christi records do not support the time, place, and circumstances under which claimant's injuries occurred were related to his employment. Based upon the evidence, claimant's injury, more probably than not, happened when he wrecked his moped and not while he was at work in the employer's service.

CONCLUSION

Claimant failed to meet the burden of proving he suffered an injury by accident arising out of and in the course of his employment with respondent.

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[22] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[23] *Kindel, supra,* at 278, citing *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 198–99, 689 P.2d 837 (1984); *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated June 9, 2014, is reversed.

IT IS SO ORDERED.

Dated this _____ day of July, 2014.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

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